No. 96-1291

In The

Supreme Court of the United States

October Term, 1996

DOLORES M. OUBRE,

Petitioner,

vs.

ENTERGY OPERATIONS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Older Workers Benefit Protection Act forecloses application of the traditional common law doctrines of ratification and estoppel in the context of an allegedly unenforceable contract for the release of claims under the Age Discrimination in Employment Act.

PARTIES TO THE PROCEEDINGS

Petitioner, appellant below, is Dolores M. Oubre.

Respondent, appellee below, is Entergy Operations, Inc. ("EOI"). Pursuant to Supreme Court Rule 29.6, EOI discloses that it a wholly owned subsidiary of Entergy Corporation. EOI does not have any nonwholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Contents

Contents

Contents

Contents

One month before the Petition for Writ of Certiorari was filed in this matter, this Court denied certiorari on the identical issue of law arising out of the same circuit from which this Petition arises. *See Hines v. ABB Vetco Gray, Inc.*, 85 F.3d 624, *cert. denied*, 117 S. Ct. 737 (1997). Furthermore, this Court has denied certiorari on the issue in question on four previous occasions.[1] As set forth below, the reasons for denying certiorari two months ago are equally applicable now. Moreover, on March 17, 1996, petitioner filed a Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60, which was pending in the disrict court at the time of the filing of this Opposition. For the foregoing reasons, respondent, Entergy Operations, Inc. ("EOI"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment entered by the United States Court of Appeals for the Fifth Circuit on November 6, 1996.

STATEMENT OF THE CASE

The Older Workers Benefit Protection Act ("OWBPA") codifies, in the context of claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, the well settled common law principle that any "waiver" of claims or causes of action must be "knowing and voluntary." 29 U.S.C. § 626(f)(1). This case presents the question of whether the OWBPA also forecloses the entirely separate and distinct common law principle, reflected in the doctrines of ratification and estoppel, that a plaintiff may not pursue claims covered by an allegedly invalid release (*i.e.*, a contractual "waiver") while simultaneously retaining the consideration received in exchange for the release. The court below correctly concluded that the

1. *See Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 204 (1994); *Walmsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); and *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996).

OWBPA does not foreclose application of the doctrines of ratification and estoppel in the ADEA context.

Petitioner is a former EOI employee who worked in the Planning and Scheduling Department of the Waterford Steam Electric Generating Station ("Waterford 3") located in Killona, Louisiana. In 1994, EOI implemented a new employee evaluation process called the Management Planning & Review Ranking Process (the "Ranking Process"). Pursuant to the Ranking Process, all Waterford 3 employees categorized as salaried were to be forced ranked against their peers. These rankings were then transferred on to a nine box matrix, with Group 1 identifying employees who ranked high in both the potential and performance categories as compared to their peers and Group 9 identifying employees who ranked low in both of those categories as compared to their peers. Employees who fell in Group 9 were given the option of accepting a voluntary severance package and signing a release or striving to improve their performance by meeting the criteria set forth in individually developed action plans.

In connection with the Ranking Process, petitioner was ranked against all other salaried, non-managerial employees in the Planning & Scheduling Department and was determined to rank low as compared to her peers. As a result, petitioner ultimately fell into the Group 9 category and, at a January 17, 1995 meeting with her supervisors, was given the option of resigning and taking a voluntary severance package or beginning an action plan. At this meeting, petitioner was provided with a letter outlining the terms of the severance package and a release and was told that she had two weeks within which to make her decision.

During this two week period, the petitioner sought legal advice from two separate attorneys regarding the effect of the

release. She subsequently elected to sign the release and received all the benefits that were due her under the voluntary severance package.

In September 1995, petitioner filed this lawsuit against EOI, alleging that she was constructively discharged from her employment in violation of the ADEA and various state laws. Petitioner sought to invalidate her release as not "knowing and voluntary," alleging that the release did not comply with the OWBPA and that she was under economic duress at the time. However, despite seeking to avoid her obligations under the release, petitioner never offered to return to EOI any of the severance benefits that she received as consideration for the release.

The district court granted summary judgment to EOI. This decision was based upon settled Fifth Circuit law, established in *Walmsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th. Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995), which holds that an employee's retention of benefits received as consideration for a release of claims operates as a ratification of an otherwise voidable contract. The Fifth Circuit subsequently affirmed the district court.

On March 17, 1997, petitioner filed a Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60. That motion was pending at the time of the filing of this Opposition.

REASONS FOR DENYING THE WRIT

I.

THE OWBPA DOES NOT FORECLOSE APPLICATION OF THE TRADITIONAL COMMON LAW DOCTRINES OF RATIFICATION AND ESTOPPEL IN THE ADEA CONTEXT.

Petitioner errs in suggesting that the OWBPA forecloses application of the traditional common law doctrines of ratification and estoppel in the ADEA context. By its terms, the OWBPA merely codifies a centuries-old principle, in the context of claims under the ADEA, that a "waiver" must be "knowing and voluntary." 29 U.S.C. § 626(f)(1). In contending that this provision somehow abrogates the equally important common law principles of ratification and estoppel, petitioner not only gives short shrift to the words of the statute but also entirely ignores both the common law background against which the statute was enacted and the interpretive principles that apply to common law abrogation claims such as hers. Petitioner's various other arguments — based on the alleged lack of consideration, the alleged analogy to *Hogue v. Southern Railway*, 390 U.S. 516 (1968) (*per curiam*), and petitioner's own policy judgments about the wisdom of the common law — are also without merit.

Petitioner does not, and could not, dispute that her claim would be barred if the traditional common law doctrines of ratification and estoppel are applicable. At common law, releases tainted by fraud, mistake, or duress, like all other contracts, are voidable at the option of the defrauded, mistaken, or coerced party. *See, e.g., Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1455 n. 4 (9th Cir. 1988) (Guam law); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1368 (6th Cir. 1975) (federal common law under the ADEA). However, just as such releases can be avoided, they also can be ratified: "the releasor who retains consideration after

learning that the agreement is voidable has effectively ratified the release and may not later avoid its terms." *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank*, 936 F.2d 846, 850 (6th Cir. 1991), *cert. denied*, 502 U.S. 1034 (1992).[2]

Ratification does not constitute enforcement of the release as a contractual obligation. Rather, it rests on the distinct principle that " 'a party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations.' " *Dahlstrom Corp. v. State Highway Comm'n*, 590 F.2d 614, 616 (5th Cir. 1979) (citation omitted). Ratification, in other words, is based on principles of estoppel: the underlying claim is barred not because the plaintiff executed an allegedly invalid contractual *waiver* but because the plaintiff's *subsequent conduct* — in retaining the consideration paid to obtain the waiver — makes prosecution of the underlying claim fundamentally unfair. *See, e.g., Cumberland & Ohio Co.*, 936 F.2d at 850; *In re Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1076 (5th Cir. 1985); *Rachesky v. Finklea*, 329 F.2d 606, 609 (4th Cir. 1964).

Before the OWBPA was enacted, courts repeatedly applied these principles in the specific context of releases of claims under the ADEA. *See, e.g., O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 (4th Cir.) ("It is a well-established proposition that the retention of the benefits of a voidable contract may constitute ratification."), *cert. denied*, 502 U.S. 859 (1991); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991) ("A party cannot be permitted to retain the benefits

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2. *See also Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259, 260 (7th Cir. 1994) (federal common law), *cert. denied*, 115 S. Ct. 741 (1995); *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) (federal common law); *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178, 182 (5th Cir. 1985) (Texas law); *DiRose v. PK Management Corp.*, 691 F.2d 628, 633-34 (2nd Cir. 1982) (New York law), *cert. denied*, 461 U.S. 915 (1983).

received under a contract and at the same time escape the obligations imposed by the contract.").[3]

Although she contends that the OWBPA abrogates these settled common law doctrines in the ADEA context, petitioner ignores the basic interpretive rules that must govern any such claim. "[W]here a common-law principle is well established the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.' " *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). Indeed, this Court repeatedly has made it clear that, "[i]n order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (*quoting Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). *See also Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) ("It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed unless the language of a statute be clear and explicit for this purpose.' " (citation omitted)).

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3. *See also Haslach v. Security Pacific Bank Oregon*, 779 F. Supp. 489, 493 (D. Or. 1991) ("Th[e] retention of the benefits [received for signing a release] is sufficient to amount to a ratification of the release agreement, regardless of whether it was initially signed under duress or misrepresentation."); *Alphonse v. Northern Telecom, Inc.*, 776 F. Supp. 1075, 1079 (E.D. N.C. 1991) ("By accepting and retaining the benefits of a release, a party to a voidable release ratifies the release and cannot avoid its obligations."); *Ponsoni v. Kraft General Foods, Inc.*, 774 F. Supp. 299, 316 (D. N.J. 1991) ("The acceptance of benefits ratifies the release of ADEA claims."), *aff'd*, 968 F.2d 14 (3d Cir. 1992); *Widener v. Arco Oil & Gas Co.*, 717 F. Supp. 1211, 1217 (N.D. Tex. 1989) ("[I]f the releasor retains the consideration after he learns that the release [is] voidable, his continued retention of the benefits constitutes a ratification of the release.").

This Court repeatedly has applied these familiar interpretive principles to the federal antidiscrimination statutes. Specifically, the Court has made clear that, absent a clear statutory intent to abrogate, provisions in antidiscrimination statutes, like those in any other statute, remain subject to common law principles such as waiver, ratification, or estoppel. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-27 (1991) (right to trial subject to waiver in favor of arbitration); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393-94 (1982) (limitations defenses subject to waiver, estoppel, and equitable tolling); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977) (EEOC right of action subject to laches); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (private right of action subject to laches).

Nothing in the OWBPA "speaks directly" to, much less rejects, the settled common law principles of ratification and estoppel. The OWBPA merely provides that "[a]n individual may not waive any right or claim" under the ADEA "unless the waiver is knowing and voluntary," and it specifies certain "minimum" requirements that waivers must satisfy in order to be "knowing and voluntary." 29 U.S.C. § 626(f)(1). It says absolutely nothing about abrogation of the distinct doctrines of ratification and estoppel.

In arguing to the contrary, petitioner essentially contends that the OWBPA modifies antecedent common law standards. In large measure, however, the OWBPA merely *codifies* settled principles of federal common law, under which any waiver of statutory or constitutional rights, by contractual release or otherwise, must be knowing and voluntary. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196 (1995); *Newton v. Rumery*, 480 U.S. 386, 393 (1987); *Moran v. Burbine*, 475 U.S. 412, 427 (1986); *Alexander v. Gardner-Denver*, 415 U.S. 36, 52 and n. 15 (1974); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). Moreover, the specific OWBPA standards for determining

whether a contractual waiver is "knowing and voluntary" largely mirror the common law standards that many courts of appeals previously had used for that purpose. *See, e.g., O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 401-02 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 517-18 (3d Cir. 1988).

At common law, for example, courts had considered "the clarity of the written agreement" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, a waiver must be "written in a manner calculated to be understood" (29 U.S.C. § 626(f)(1)(A)). At common law, courts had considered "whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, the waiver must be "in exchange for consideration in addition to anything of value to which the individual already is entitled" (29 U.S.C. § 626(f)(1)(D)). At common law, courts had considered whether an employee "was represented by or consulted with an attorney" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, an employee must be "advised in writing to consult with an attorney" (29 U.S.C. § 626(f)(1)(E)). At common law, courts had considered "the amount of time the plaintiff had possession of or access to the agreement before signing it" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, an employee must be given a specified period of time to consider the waiver (29 U.S.C. § 626(f)(1)(F)). In short, the OWBPA is hardly the emphatic repudiation of the common law that petitioner would make it out to be.

Indeed, as observed by the Fourth Circuit in *Blistein v. St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996), Congress's reliance upon the common law terms "knowing and voluntary" suggests that Congress "was defining only those circumstances in which a contract would be voidable, not when it would be

void." "[I]f anything, the text of OWBPA lends support to that holding through its implicit recognition that an ADEA release agreement that does not meet the OWBPA's requirements is merely a voidable, not a void contract." *Id.*

The conclusion that a release which fails to satisfy the OWBPA's requirements is merely voidable, and thus subject to ratification, is further bolstered by Congress's inclusion in the OWBPA of § 626(f)(1)(G). This section expressly provides for a seven day period after the execution of a waiver agreement during which an employee may revoke the agreement. It also provides that the agreement does not become enforceable until the expiration of the seven day revocation period. 29 U.S.C. § 626(f)(1)(G). "If noncompliance with the other subparts . . . rendered the agreement void there would be no need for subpart (G)." *Walmsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995). Surely Congress would not give an employee the right to void a non-complying release, as provided in subpart (G), if such a release were void *ab initio*. The petitioner has failed to present any evidence that Congress intended such an anomalous result.

Finally, petitioner advances a series of arguments based on the alleged analogy to *Hogue v. Southern Railway*, 390 U.S. 516 (1968), her own policy judgment that the doctrines of ratification and estoppel are unwise, and her claim that she did not receive consideration for the release of claims. Petitioner's arguments are not based in fact or law and, thus, are insufficient to support her claim.

Petitioner asserts that the OWBPA should be construed as the Federal Employers Liability Act ("FELA") was construed in *Hogue*. Pet. 21-22. In *Hogue*, this Court held that a plaintiff, in order to prosecute claims under FELA, need not tender back the consideration paid to him for a release allegedly invalid on

the ground of mutual mistake. *See* 390 U.S. at 517. For several reasons, however, petitioner's proposed analogy to *Hogue* is unsound.[4]

To begin with, *Hogue* on its face is a poor candidate for the dramatic extension, from the FELA to the ADEA, urged by petitioner. In *Hogue*, after this Court granted certiorari, the respondent employer purported to confess error and refused to present either briefing or oral argument on the tender requirement at issue there. *See id.* at 516. The Court issued a terse three-page *per curiam* opinion, rendered without the benefit of adversary presentation and limited by its terms to claims under FELA and releases challenged on the ground of mutual mistake. *See id.* at 517. Not surprisingly, petitioner can cite no other decision of this Court, in the quarter-century since *Hogue* was decided, or in the two centuries before it was decided, foreclosing application of the doctrines of ratification and estoppel in any other context.

Moreover, the Fifth Circuit has correctly concluded that *Hogue's* FELA holding cannot fairly be extended beyond the "unique" context of that particular statute. *Walmsley*, 11 F.3d at 540. The FELA provides a federal remedy for railroad workers injured by the negligence of their employer. As the *Walmsley* court explained, however, the FELA was designed not only to "discourage negligent conduct" by employers, but to actively "facilitat[e] recovery by injured railroad workers." *Id. See also Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) (FELA designed "to provide for liberal recovery"). To achieve

4. The authority upon which petitioner relies to challenge the application of ratification and estoppel is based primarily on *Hogue. See Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994); *Forbus v. Sears, Roebuck and Company*, 958 F.2d 1036 (11th Cir. 1992); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991); and *Constant v. Continental Telegraph Co.*, 745 F. Supp. 1374 (C.D. Ill. 1990).

that goal, a "primary purpose" of the statute was "to eliminate a number of traditional defenses to tort-liability." *Atchison T. & S.F. Ry. v. Buell*, 480 U.S. 557, 561 (1987). *See also Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 507-08 (1957) ("The employer is stripped of his common law defenses."). In particular, the FELA expressly states that "[a]ny contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created under this chapter, shall to that extent be *void*." 45 U.S.C. § 55 (emphasis added). The OWBPA, by contrast, does not render contractual waivers "void," but merely requires them to be "knowing and voluntary" under specified standards. 29 U.S.C. § 626(f)(1). Thus, *Hogue* provides no support for petitioner's proposed construction of the OWBPA to foreclose application of the doctrines of ratification and estoppel in the ADEA context.

Petitioner also advances a series of "policy" arguments (Pet. 22-23) that amount to a thinly-veiled contention that the doctrines of ratification and estoppel are unwise and unfair. Of course, these arguments are all legally irrelevant, since the pertinent question is not the wisdom or fairness of these doctrines, but whether the OWBPA has "directly" abrogated them. *See United States v. Texas*, 507 U.S. at 534 (citation omitted). Even on their own terms, however, petitioner's policy arguments lack merit.

The issue in this case is very simple: whether an employee who receives severance compensation in exchange for a release of, *inter alia*, an age discrimination claim, may retain such compensation while challenging the release by suing the employer for age discrimination. The answer must be no. A contrary answer would permit the employee to finance litigation against his or her employer with the same funds the employer paid the plaintiff as consideration for a release from such

litigation. As recognized by the Fourth Circuit in *Blistein*, a plaintiff simply cannot have it both ways.[5]

The courts which have rejected the ratification argument have expressed concern that such a rule would "chill" legitimate age discrimination suits. *See, e.g., Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991). Such a concern simply does not comport with reality. It is undisputed that the overwhelming majority of plaintiffs enter into contingent fee arrangements with their lawyers, whereby the costs of litigation are taken from the ultimate recovery. One cannot seriously argue that the Fifth Circuit's tender back rule "chills" contingent fee agreements. Moreover, requiring a plaintiff to tender back severance/release consideration merely requires the plaintiff to return to the position in which he or she would have been absent the severance agreement: with the ability to file a lawsuit but without the compensation the employer paid to avoid a lawsuit.

Rather than "chill" lawsuits filed by plaintiffs, a refusal to require a tender back in ADEA cases would more likely "chill" settlements or an employer's willingness to offer such added severance benefits. If confronted with such a rule, employers would have reduced incentive to prospectively settle possible age cases or to provide employees with extra severance compensation in exchange for a release. Fearing a technical violation of the OWBPA, employers would be more inclined to retain severance benefits to finance the defense of the age cases that are actually filed.[6] This result would run contrary to the

5. In *Blistein*, the Fourth Circuit concluded: "If we were to follow *Oberg* . . . we would allow persons like [the plaintiffs] to have it 'both ways,' to retain the benefits that they receive pursuant to their retirement agreements, yet to challenge, through suits against their unsuspecting employers, the very agreements under which those benefits were extended. This, we find no evidence Congress contemplated." 74 F.3d at 1466.

6. In *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d (Cont'd)

ADEA's express purpose of helping employers and workers find a way of meeting problems arising from the impact of age on employment. *See* 29 U.S.C. § 621(b).

Petitioner also claims that she did not receive consideration for the release agreement at issue. Her argument that she was already entitled to the amounts paid to her, without signing a release, is conclusory and not supported by the evidence. Petitioner bases her position on the fact that: (1) employees who had been *involuntarily* terminated in 1994 did not have to sign releases in order to receive severance benefits and (2) employees who opted participate in voluntary severance programs offered by EOI in late 1995 — approximately ten months after petitioner resigned her position — received more money in exchange for their releases than she did. Pet., 16.

As the evidence presented to the district court establishes, the *involuntary* severance packages used in 1994 were implemented prior to the Ranking Process and were used in connection with downsizing efforts within the company. Furthermore, although employees who were severed during that time period were not required to execute releases, these people were *involuntarily* terminated. Prior to the time petitioner resigned, EOI adopted a policy whereby any employee who opted to participate in a *voluntary* severance program was required to execute a release of claims in order to receive severance benefits. Further, with respect to the additional amounts offered employees as part of a voluntary severance program implemented by EOI in late 1995, those packages are irrelevant as they were offered as part of a downsizing effort that took place after petitioner resigned.

(Cont'd)
259, 260-61 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995), the Seventh Circuit endorsed the principle that the tender back rule makes releases more valuable to employers and encourages voluntary settlements, which benefits both employees and employers in the long run.

Petitioner fails to cite any authority in support of her contention that an employer cannot adopt new and different severance programs over time. Indeed, such a restriction would place an employer in the position of being unable to adjust in response to shifting economic and business considerations. For example, under petitioner's argument, if, at some point in the future, an employer offered a more favorable voluntary severance program to its employees than had been offered in the past, all employees who participated in the earlier program would be permitted to come back and claim that they did not receive adequate consideration. This is illogical, and its practical effect would be to bring the use of severance programs by employers to a screeching halt.

Simply put, petitioner offers no evidence that she was entitled to the benefits she received if she had refused to sign a release. To the contrary, the evidence establishes that the voluntary severance package petitioner was offered required her to sign a release and that, without the release, petitioner would not have been paid any severance benefits. Thus, the money petitioner received clearly was consideration to which she was *not* already entitled.[7]

II.

THE ALLEGED CIRCUIT CONFLICT IS NOT APPROPRIATE FOR REVIEW AT THIS TIME.

Petitioner also argues that this Court should grant certiorari to resolve an alleged split between the Fifth Circuit and the Seventh and Eleventh Circuits.[8] However, upon scrutiny, it is

7. Petitioner also fails to explain why this Court should consider the highly factual issue of whether she received consideration in this individual case.

8. Petitioner does not address the fact that one panel decision out of (Cont'd)

apparent that the alleged conflict is, at best, undeveloped. As Justice Harlan explained, certiorari should be denied "where it seems likely that the conflict may be resolved as a result of further cases in the Courts of Appeals." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 112 (1959). This is such a case. Recent jurisprudence from the Seventh Circuit signals a shift toward possible adoption of the tender back requirement. Further, the Eleventh Circuit has not readdressed the tender back issue since its 1992 pre-OWBPA decision in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992) and, consequently, has failed to analyze many arguments supporting the tender back requirement.

Petitioner correctly notes that, in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 679 (1994), a Seventh Circuit panel held that an ADEA plaintiff need not tender back the consideration paid to him for an allegedly invalid release in order to proceed with a lawsuit. *See id.* at 683. However, recent jurisprudence from the Seventh Circuit signals a shift toward possible adoption of the tender back requirement. *See, e.g., Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995).

In *Fleming*, the Seventh Circuit enforced a tender back requirement where the plaintiff challenged the validity of a release of her Title VII and Rehabilitation Act claims. Speaking

(Cont'd)
the Fourth Circuit recently upheld the tender back requirement in the context of the OWBPA, while two panels out of the Third and Sixth Circuits rejected the tender back requirement. *See Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996); *Long v. Sears, Roebuck & Company*, 105 F.3d 1529 (3rd Cir. 1997); and *Raczak v. Ameritech Corporation*, 103 F.3d 1257 (6th Cir. 1997). However, as discussed herein, these decisions do not warrant granting certiorari on this issue at this time.

through Chief Judge Posner, a unanimous panel (Eshback and Easterbrook, JJ.) cited the Fifth Circuit's *Walmsley* decision — with approval — for the proposition that "a release can be rescinded only upon a tender of any consideration received." 27 F.3d at 260-61. The Seventh Circuit held that, because the tender back rule is a widely accepted "general principle of contract law," it "would surely be a component of any federal common law of releases." *Id.* The Seventh Circuit explained in detail how this rule, by making releases more valuable to employers, and thus encouraging voluntary settlements, helps both employers and employees in the long run. "The tender requirement is not a remedy. It is a protection for defendants, although it may as we have noted benefit plaintiffs in the long run too; a premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract." *Id.* at 262.

Addressing age discrimination cases specifically, the Seventh Circuit commented that the common law rule "*may* have to give way," but noted that the Fifth Circuit in *Wamsley* had "strongly criticized our decision in *Oberg*." *Id.* at 261 (emphasis supplied). Tellingly, the Seventh Circuit referred to *Oberg* and its progeny as follows: "The idea behind these cases . . . is a little obscure to us." *Id.* (citations omitted). Thus, it is possible that this Court's intervention will not be necessary to correct any perceived conflict between the Fifth and Seventh Circuits, as the latest jurisprudence from the latter circuit appears to signal a shift toward adoption of the tender back requirement in employment cases generally.

Petitioner also cites the Eleventh Circuit's *Forbus* decision as evidence of a conflict. Initially, as noted, *Forbus* was a pre-OWBPA decision. In *Forbus*, the Eleventh Circuit relied almost entirely on this Court's holding in *Hogue* to reject a tender back requirement, stating that neither the Fifth Circuit nor the Fourth

Circuit had considered the *Hogue* decision in their analysis of the issue.[9] *Forbus*, 958 F.2d at 1040-41. Following the *Forbus* decision and the enactment of the OWBPA, the Fourth and Fifth Circuits were presented with opportunities to extend the *Hogue* rationale to claims brought under the ADEA, but both declined to do so. *See Walmsley*, 11 F.3d at 540-42 and *Blistein*, 74 F.3d at 1465-66 (4th Cir. 1996). Importantly, the Eleventh Circuit has not revisited the issue since *Forbus*, and, as a result, has not addressed the subsequent analysis of the issue out of the Fifth and Fourth Circuits.[10] Thus, this Court's intervention at this time would be premature.

Finally, although panels in the Third and Sixth Circuits recently rejected the tender back requirement, neither decision was unanimous,[11] the employer in the Sixth Circuit has a pending application for rehearing *en banc*, and the Sixth Circuit has ordered that an opposition to the rehearing application be filed.[12]

This Court has indicated repeatedly in recent years that the precise judicial disagreement alleged by petitioner does not presently warrant further judicial review. Indeed, the petitioners in *Oberg* and *Walmsley*, and more recently in *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert.*

9. *Forbus* addressed the Fifth Circuit's decision in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) and the Fourth Circuit's decision in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991), both pre-OWBPA cases.

10. As the Fourth Circuit explained in *Blistein*, 74 F.3d at 1466, the OWBPA itself contains strong textual indications that the tender-back requirement *does* apply to claims under the ADEA.

11. Indeed, none of the three separate opinions in *Raczak* has any precedential significance. The controlling opinion in that case is the separate concurrence of Judge Gray, which is expressly limited "to the facts" of that case. 103 F.3d at 1271.

12. On March 11, 1997, the Third Circuit entered an order denying rehearing *en banc*.

denied, 116 S. Ct. 1042 (1996) and *Hines v. ABB Vetco Gray, Inc.*, 85 F.3d 624, *cert. denied*, 117 S. Ct. 737 (1997), sought writs of certiorari from this Court on this very issue and were rejected. Considering the Seventh Circuit's apparent shift toward the tender back rule, the fact that the Eleventh Circuit has not addressed the issue since the enactment of the OWBPA, and the fact that an application for rehearing *en banc* is pending in the Sixth Circuit, this Court's intervention at this time may well be premature and ultimately unnecessary.

CONCLUSION

For the reasons set forth herein, the Court should deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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